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A New Vision for Nonconformity Regulation

Monday, April 26, 2004

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How do we deal effectively with the problem of nonconforming uses in our zoning codes? The traditional approach has aimed at elimination, but Arthur C. Ientilucci, director of zoning for the city of Rochester, New York, argues that this is too harsh and unforgiving and discourages reinvestment in many worthwhile properties, particularly in central cities.

Last year, Ientilucci published an article in *Zoning News* that made this case, and the session combined him with land-use attorney and consultant Eric Damian Kelly, FAICP, for a lively presentation on this issue before a packed room of 130 people. The session was sponsored by *Zoning Practice* (formerly *Zoning News*) and moderated by co-editor Michael Davidson.

Ientilucci started with an overview of Rochester, a city of 220,000 that lost one-third of its former peak population over the years. Rochester used a series of conventional zoning codes from 1929 to 2003, but in 1993 it launched a decade of planning that sought to revive its neighborhoods, culminating in 2003 with the adoption of a new zoning code that takes a dramatically new approach with a more positive outlook to the issue of nonconformities.

"Clearly some nonconformities need to go away," Ientilucci told the audience, "but others should be preserved and cherished."

Showing a series of photos of such properties, he demonstrated how a new flexibility in the code allowed, for instance, an old firehouse to be converted to a crafts shop, and a former gas station to a cafe, both fitting in neatly with the residential neighbors and enhancing the quality of life in the neighborhood. Ientilucci said that providing room for such options in the code encourages "urban re-fill" and reinvestment and helps to stabilize older neighborhoods, instead of creating vacant lots and buildings that no longer have a viable economic option for reuse.

He concluded with a series of rules, the first of which was that nonconformity regulations should be "elastic," allowing for notice to and comment from neighbors, who can aid planners in determining an appropriate balance between low impacts and desirable conveniences.

Eric Kelly, now with Duncan Associates, used examples from his current home town of Muncie, Indiana, to reinforce many of Ientilucci's points while adding observations from his years of consulting work with other communities. At one point, he said that we need to "suck from the inside of the balloon" to make the reuse of urban sites more attractive and thus promote smart growth. We need to "balance the interests of the property owner and neighbors" in considering reuse of nonconforming structures. He suggested that wholesale zoning changes and attempts to simplify codes in the 1960s and 1970s had often created whole neighborhoods of nonconforming lot sizes, which should simply be redefined into conformity in order to avoid widespread blight from the abandonment of such properties.

Kelly concluded with a discussion of "blended policy goals," which would maintain restrictions on high-impact and low-cost-fix nonconformities, while reducing or eliminating restrictions on "low-impact and high-cost-fix" nonconformities. He added that there is a need to balance competing interests on other nonconformities, and to

set a "date certain" for the elimination of nonconforming signs.

The session ended with a lively question-and-answer exchange with an audience that the speakers clearly had succeeded in engaging with the topic.

MAY 2002
~~September 27, 2005~~

Proposed Revisions to the Code Addressing Nonconformities

Background

Nonconformities are uses or developments that were legal at the time they were established or constructed, but no longer meet the current code requirements. These usually come about through the adoption of a zoning code, or subsequent revisions to the zoning code. The theory behind these is that the property owner should not be immediately penalized for an action affecting his property that was not done at his instigation. In most cases, these nonconformities may be continued indefinitely. General planning policy is that elimination or cessation is the most appropriate action related to a nonconforming use or development nonconformity. Replacement by a use or development that conforms to all current zoning standards is the preferred action. While structural and general maintenance are encouraged for nonconforming developments, expansion that would increase the nonconformity are prohibited. However, if circumstances change such that the nonconforming use or other nonconformity is removed, it cannot be replaced. Any subsequent development must comply with all aspects of the current code.

This is different than a "grandfather" provision that applies usually to specific uses in specific areas.. Here, a certain aspect of the code is specifically waived permanently. If a building or uses ceases or is demolished, it may be replaced in kind and in its original location.

The intent of the revisions proposed by the staff is to accomplish two things: make plain language changes for clarity, and more clearly demarcate the difference between a nonconforming use and a nonconforming building or structure.

Analysis

The staff of CPDS has been meeting regularly with the legal staff to review the proposed changes to the code. The recommendations set forth reflect our consensus on the changes for purposes of public comment.

The current code provides definitions for "development nonconformity" and "use, nonconforming". However, the language of both definitions blurs the distinctions. A use is an activity that is performed on a piece of land. The code allows a wide range of uses, regulated by the land use tables. A land use is either permitted, allowed by special exception, or prohibited. Development standards regulate the height, bulk, setback, and density of development on a site. A nonconforming use may be accommodated within a building or structure that complies with all of the code standards. Similarly, a permitted use may occur within a nonconforming building or structure. The two concepts should not be commingled any more than necessary.

The attached chart provides a summary of the changes recommended by the staff for each section to be modified. Also attached is a draft text amendment that would provide the necessary changes to implement these recommendations.